IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

MONDAY, THE 12TH MARCH 2007 / 21ST PHALGUNA 1928

RSA.No. 811 of 2003()

AS.79/1995 of DISTRICT COURT, MANJERI
OS.29/1988 of SUB COURT, MANJERI

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APPELLANT/APPELLANT/PLAINTIFF:

NEERMUNDA MOHAMMED,
S/O.VEERAN, MAMPAD AMSON DESOM,
ERNAD TALUK, MALAPPURAM.

DIED. LRs OF DECEASED APPELLANT ARE IMPLEADED AS SUPPLEMENTAL 2ND TO 11TH APPELLANTS AS PER ORDER DT.9/11/04 IN IA 2190/04

2. MATTUMMAL BEE YUMMA, W/O.LATE NEER MUNDA MUHAMMED, AGED 75 YEARS, R/O.NEER MUNDA HOUSE, PANTHALINGAL, MEPPADAM.P.O., MEPPADAM 676542, NAMBAD AMSOM, NILAMBUR TALUK, MALAPPURAM DISTRICT

3. NEER MUNDA FATHIMA, D/O.LATE NEER MUNDA MUHAMMED, AGED 50 YEARS, R/O.NEER MUNDA HOUSE, PANTHALINGAL, MEPPADAM.P.O., MEPPADAM 676542, NAMBAD AMSOM, NILAMBUR TALUK, MALAPPURAM DISTRICT

4. NEER MUNDA AYISHA, D/O.LATE N EER MUNDA MUHAMMED AGED 48 YEARS, R/O.NEER MUNDA HOUSE, -DO- -DO-

5. NEER MUNDA HAVVA UMMA, D/O.LATE NEER MUNDA MUHAMMED, AGED 46 YEARS, R/O.NEER MUNDA HOUSE, -DO- -DO-

6. NEER MUNDA ABDUL SALAM, S/O.LATE NEER MUNDA MUHAMMED AGED 44 YEARS, -DO- -DO-

7. NEER MUNDA SUBAIDA, D/O.LATE NEER MUNDA MUHAMMED AGED 40 YEARS, -DO- -DO-

8. NEER MUNDA ABDUL HABEEB, S/O.LATE NEER MUNDA MUHAMMED AGED 38 YEARS, -DO- -DO-

9. NEER MUNDA UMMU SALMA, D/O.LATE NEER MUNDA MUHAMMED AGED 50 YEARS, -DO- -DO-

10. NEER MUNDA SAKKIR, S/O.LATE NEER MUNDA MUHAMMED
AGED 34 YEARS, -DO- -DO-

11. NEER MUNDA AMINA, D/O.LATE NEER MUNDA MUHAMMED
AGED 30 YEARS, -DO- -DO-

BY ADV. SRI.T.KRISHNAN UNNI
SRI.K.M.SATHYANATHA MENON

RESPONDENTS: RESPONDENTS/DEFENDANTS:
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1. PAYYANI AHAMMED
S/O.KUNHALAN, THIRUVALI AMSOM DESOM,
ERNAD TALUK, MALAPPURAM.

2. CHERUPALLIKKAL AYISHABI
W/O.KUPPANATH MUHAMMED, THIRUVALLI AMSOM DESOM,
ERNAD TALUK, MALAPPURAM.

SUPPLEMENTAL 3RD RESPONDENT

NEER MUNDA ABDUL LATHEEF, S/O.NEER MUNDA MUHAMMED
AGED 42 YEARS, R/O.NEER MUNDA HOUSE, PANTHALINGAL,
MEPPADAM.P.O., MEPPADAM 676542 MAMBAD AMSOM,
NILAMBUR TALUK, MALAPPURAM DISTRICT.

LR OF DECEASED APPELLANT IS IMPLEADED AS SUPPLEMENTAL 3rd RESPONDENT AS PER ORDER DT.9/11/2004 IN IA 2190/04

R1 & R2 BY ADV. SRI.A.P.CHANDRASEKHARAN (SR.)
SMT.PRABHA R.MENON
SRI.M.KRISHNAKUMAR

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 12/03/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

ORDER ON I.A.NO. 811/03 & 2679/06 IN RSA 811/03

DISMISSED

12/3/2007

SD/-M.SASIDHARAN NAMBIAR,JUDGE.

//True copy//

PA to Judge.

M.SASIDHARAN NAMBIAR,J.

R.S.A .NO. 811 OF 2003

Dated 12th March 2007

J U D G M E N T

Plaintiff in O.S.29/1988 on the file of Sub court, Manjeri is the appellant. Defendants are respondents. Suit was originally filed for permanent prohibitory injunction. Case of appellant was that plaint schedule property originally belonged to Kizhakkekovilakam and one Kuppanath Kammu obtained the property on lease and while so, as per court sale in execution of decree in O.S.87/31 property was sold in E.P.828/32 and was purchased by Pulath Mammadkutty and he has been in possession of property and while so, appellant obtained property on lease as per Ext.A1 Verumpattachit in 1950 and he has been in possession of property and obtained purchase certificate from Land Tribunal as per order in O.A.784/75 and respondent with a view to reduce plaint schedule property into their possession attempted to trespass and respondents have no right to do so and they are to be restrained by a permanent

prohibitory injunction from trespassing into plaint schedule property. Respondents in their written statement contended that property was with Cherupallikkal Kunhimuhammed Haji and as per oral lease first defendant obtained the property and under Ext.B5 assignment deed it was transferred to second defendant and plaintiff has no right or title to plaint schedule property and therefore suit is to be dismissed. Learned Munsiff after recording evidence dismissed the suit. Appellant filed A.S.52/1983 challenging the dismissal of the suit. First appellate court remanded the suit for fresh disposal. After remand plaint was got amended incorporating an alternative plea for recovery of possession. Suit was then returned for presentation before proper court. Hence plaint was represented before Sub court, Manjeri as O.S.29/1988. Learned Sub Judge framed necessary issues. On the side of appellant, he was examined as PW1 and on the side of respondent first defendant was examined as DW1. Exts.A1 to A23 and Exts.B1 to B12, Exts.C1 to C3 and Ext.X1 were marked. Learned Sub Judge on the evidence found that that plaint schedule property was obtained by Mammadkutty under Ext.A11 sale certificate and item No.10 therein is the plaint

schedule property and identity of the property was not established. Learned Sub Judge also found that oral lease set up by defendants is supported by Exts.B1 to B4 rent receipts. As appellant did not establish that plaint schedule property is part of item No.10 of Ext.A1 property, it was held that appellant did not establish the title and therefore he is not entitled to the relief sought for. Suit was dismissed with cost. Appellant challenged the decree and judgment before District court in A.S.79/1995. Learned District Judge elaborately considered the evidence and on re-appreciation of evidence found that as suit after amendment is for recovery of possession on the strength of title, weakness of defence case or failure of defendant to establish his title will not enable plaintiff to get a decree for recovery of possession on the strength of title and from the evidence identity of plaint schedule property as the property covered by Ext.A11 was not established and appellant is not entitled to the decree sought for. Appeal was dismissed. It is challenging the dismissal of the appeal plaintiff preferred the second appeal.

2. Learned counsel appearing for appellant was

heard. Arguments of learned counsel was that Ext.A11 shows description of properties and it is part of Pazhamadam Parambu and even if property has not been properly identified, an opportunity should have been granted by first appellate court to prove that plaint schedule property is part of Ext.A11 property and thereby appellant has title to the property and hence an opportunity is to be granted and suit is to be remanded.

3. On hearing learned counsel appearing for appellant, I do not find any substantial question of law involved in the appeal. As suit is for recovery of possession on the strength of title, plaintiff is entitled to get a decree only on establishing title. Fact that defendant did not establish his title or weakness of the defence case will not enable plaintiff to get a decree. Appellant can succeed in getting a decree for recovery of possession only on proving that plaint schedule property forms part of the property covered under Ext.A11. Identity of plaint schedule property as item No.10 of Ext.A11 was not established. Though learned counsel appearing for appellant vehemently argued that an opportunity should be granted to appellant to prove the identity, in the facts and circumstances of the case,

I do no find any reason to grant further opportunity. Originally decree and judgment were set aside and suit was remanded after permitting appellant to amend plaint converting the suit to one for recovery of possession. Even though an opportunity was granted appellant did not take out commission. At this belated stage, I do not find that it is in the interest of justice to remand the case once again. On the available evidence trial court and first appellate court rightly found that appellant did not establish the title to the plaint schedule property. That factual finding cannot be interfered in exercise of the powers of this court under Section 100 of Code of Civil Procedure.

This appeal is dismissed.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.